May 29, 2002

VIA FAX and E-MAIL

Ms. Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
Washington, DC 204630

Re: Notice 2002-7

Dear Ms. Smith:

We appreciate the opportunity to comment on the Commission's proposed rules to implement Title I of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), issued as Notice 2002-7, and published in the Federal Register at 67 Fed. Reg. 35654 (May 20, 2002).

As noted below, there are many important issues on which either our interpretation of the Act, or the plain language of the Act, differs significantly from the Commission's proposed interpretation. Because of the unique legislative history of this new law, we believe the Commission should give great weight to our views in order to implement the law properly. Furthermore, in the absence of committee reports, the detailed presentations on the floor of the House and the Senate by the principal sponsors of the legislation best represent Congressional intent on various key provisions at issue in these regulations.

The soft money ban is the central component of BCRA and was the central feature of our seven year effort to reform the campaign finance system. As Sen. Feingold said during debate in the Senate:

> The soft money ban is the centerpiece of this bill. Our legislation shuts down the soft money system, prohibiting all soft money contributions to the national political parties from corporations, labor unions, and wealthy individuals. State parties that are permitted under State law to accept these unregulated contributions would be prohibited from spending them on activities relating to Federal elections. And Federal candidates and officeholders would be prohibited from raising soft money under our bill. That's a very

> significant provision because the fact that we in the Congress are doing the asking is what gives this system an air of extortion, as well as bribery.

Cong. Rec. S2446 (Mar. 19, 2001). Throughout our fight for this reform law, skeptics regularly told us what we were doing would not reduce the impact that big money was having on politics and legislation. "Money is like water," they said, or "like ants in a kitchen." We therefore worked hard to craft a tight and effective ban, and we ask the Commission to be true to that goal as it crafts the final rules.

In every case where there is a choice to be made between interpretations of the statute or formulations of regulatory language, the question the Commission should ask is this: "Which option best reflects the principal goal of the legislation, which was to prohibit soft money from being used in Federal elections and to end its corrupting influence on the legislative process?" Only if the Commission adopts the recommendations we make in these comments will the final regulations reflect the will of the people of this country, as expressed through their elected representatives, that soft money be banned.

As will be seen in our detailed comments, there is much in these proposed rules with which we agree. The Commission *must*, however, make a number of important modifications to these proposed rules in order for them to be consistent with legislative intent. Before turning to our detailed comments, we wish to highlight the most significant changes:

- The proposed definitions of "agent," "establish, finance, maintain or control," and "solicit or direct" fail to capture the plain meaning of these terms used in BCRA and to effectuate the central goal of the statute -- to end completely the soft money system. All of these terms were intended to broaden the coverage of the statute and prevent its evasion. The proposed definitions instead create loopholes through which the existing system could continue to operate. If included in the final rules, they would signal a lack of will on the part of the Commission to interpret and enforce the Act consistent with legislative intent.

- The proposed definition of "promote, support, oppose, or attack" is contrary to the plain meaning of those terms and Congressional intent. It would completely undermine the central purpose of BCRA -- to eliminate the use of soft money in Federal elections by both national and state parties. While the plain language of the statute reaches beyond "express advocacy," a concept that the courts have never applied to political party committees, the proposed definition relies on a variation of the definition of express advocacy used in previous, inadequate Commission regulations. It would severely and improperly limit the reach of the state party soft money ban.

- The intent of BCRA was to define a set of "Federal election activities" that must be paid for exclusively with hard money, rather than allocated between hard and soft money as is the current practice. These are not the only state and local party activities, however, that affect Federal elections. To the extent that some activities of state and local parties that are now considered mixed or allocable are

not "Federal election activity" as defined in the Act, they should continue to be allocated. To permit them to be paid for with purely soft money, as the proposed rules suggest, would be a step backward, plainly inconsistent with legislative intent.

- The proposed new allocation ratios for state and local party activities undermine the purpose and intent of BCRA by underestimating the impact on Federal elections of their allocated activities and allowing an unacceptable amount of soft money to continue to be spent on activities that influence Federal elections. The Commission must adopt one of the two alternatives that we propose in these comments to be consistent with the intent of the new law.

Furthermore, in its discussion of the regulations, the Commission asked for comment on several alternative approaches to the proposed regulations that would undermine the central purpose, and at times the plain meaning, of BCRA. Here are two notable examples:

- Voter registration activities by state and local party committees within 120 days of a Federal election and get-out-the-vote activities are plainly within the statutory definition of Federal election activities. We do not believe these activities can ever be "non-partisan" when carried out by political parties. But in any event, there is no statutory basis for exempting supposedly "non-partisan" activities from the definition. To do so would reopen the soft money loophole almost before the ink is dry on the Act.

- BCRA's definition of "Federal election activity" covers get-out-the-vote activity, voter identification and generic campaign activity "in connection with an election in which a candidate for Federal office appears on the ballot." The intent of this provision is that such activities be considered "Federal election activity" starting at the beginning of a two-year Federal election cycle, except in states holding regularly scheduled state elections in odd-numbered years. Any attempt to shorten this time period or otherwise restrict the definitions of Federal election activity to activity immediately proximate to elections would undermine the clear purpose and intent of BCRA and open up a gaping loophole in the newly enacted soft money ban.

Attached please find our specific comments on the proposed regulations and our answers to certain questions the Commission raised in the commentary to the proposed rules. We look forward to working with the Commission throughout this rulemaking process to ensure that the implementation of BCRA is consistent with the clear statutory language in the Act and our intent as authors of the legislation.

Sincerely,

_____	_____
John McCain United States Senate	Christopher Shays Member of Congress
_____	_____
Russell D. Feingold United States Senate	Marty Meehan Member of Congress

Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, and Representative Marty Meehan

Proposed 11 CFR § 100.14, Definition of a state/subordinate/local/district committee

The Commission's proposed definitions require that an organization be "part of the official party structure" in order to be considered a state, subordinate of a state, district or local committee of a political party. We strongly object to this requirement.

As noted by Commissioner Thomas in his May 8th memorandum, adoption of the "part of the official party structure" requirement might encourage the creation of purportedly "unofficial" party entities at the state and local levels – seeking to avoid BCRA's new hard money financing requirements yet manifestly engaged in party operations. Notably, BCRA does not supply or suggest this requirement, and it was not contained in the previous regulatory definition of a "state committee." While the "part of the official party structure" language has been used in 11 CFR § 100.5(e), that regulation merely illustrates examples of political committees. The definition contained in 11 CFR § 100.14, however, serves a different function: to describe all entities covered by BCRA's provisions relating to "Federal election activity" by state, district or local committees of a political party, whether or not they are political committees. Accordingly, conforming the two sections is incorrect.

Furthermore, the definitions of state, district and local committees should include entities that are directly or indirectly established, financed, maintained or controlled by not only such organizations, but also their agents.

Accordingly, the Commission should define a state, district or local committee of a political party as: "[the/any] organization that by virtue of the bylaws of a political party or the operation of state law is part of the official party structure *or* is responsible for the day-to–day operation of the political party at the [state/local, county, neighborhood, etc.] level, including an entity that is indirectly or directly established, financed, maintained or controlled by that organization *or its agents*, as defined by the Commission." Likewise, a subordinate committee of a state committee would constitute "any organization that is part of the official party structure *or* is responsible for the day-to-day operation of the political party at the level of city, county . . ."

In addition, the Commission's proposed definition of a "district or local committee" states that the organization must be "responsible, *under state law*, for the day-to-day operation of the political party . . . ." (emphasis added). The "under state law" language is not contained in the largely parallel definition for a "state committee" and should therefore be omitted here.

Proposed 11 CFR § 100.24, Definition of Federal election activity

In its commentary, the Commission correctly notes that non-partisan activities intended to encourage individuals to vote or register to vote appear to come within BCRA's definition of "Federal election activity." Nonetheless, it inquires whether non-partisan get-out-the-vote drives

should be excluded from the definition of "Federal election activity" and whether and when it is appropriate to treat party or candidate-initiated or 501(c) activities as non-partisan voter drives.

We strongly oppose excluding non-partisan get-out-the-vote, voter registration, voter identification, and other activities that meet the clear statutory criteria for "Federal election activity" from treatment as "Federal election activity" under the Commission's regulations. This would be flatly inconsistent with BCRA – which makes no such distinction – and spawn dangerous consequences.

In his May 8th memorandum, Commissioner Thomas correctly noted that such an exclusion would, at a minimum, allow Federal officeholders and candidates to solicit unlimited donations for 501(c) non-profit organizations whose primary purpose is to engage in non-partisan get-out-the-vote and voter registration activities. The intent of BCRA was to *prohibit* Federal officeholders and candidates from soliciting unlimited donations for these 501(c) organizations. Furthermore, voter registration, get-out-the-vote, voter identification, or other Federal election activities undertaken by state, district or local party committees cannot be considered "non-partisan" – though, again, our broader point is that even non-partisan election-related activity that meets the clear statutory criteria for "Federal election activity" must be treated as "Federal election activity."

(a)(1) We approve of proposed 11 CFR § 100.24(a)(1), including the exclusion in this instance of "any special election" from the scope of the term "a regularly scheduled Federal election." We agree with the Commission's commentary, however, that voter identification, get-out-the-vote activity, and generic campaign activity would constitute Federal election activity if conducted in connection with a special election in which one or more candidates for Federal office appears on the ballot.

(a)(2) We have comments on the components of 11 CFR § 100.24(a)(2).

(i) "Voter identification"

We believe that the comma following "surveys" in the proposed regulation should be deleted, to clarify that voter identification includes *all* "activities designed to determine registered voters, likely voters, or voters indicating a preference for a specific candidate or party."

In response to questions posed in the Commission's commentary on this proposed regulation:

- It would be incorrect to exclude from the definition of "voter identification" any effort to identify potential voters that makes no mention of a Federal candidate. Such a broad exclusion would exempt voter identification efforts that clearly affect Federal elections and are covered by BCRA. Indeed, more generally, BCRA imposes new requirements upon state, local and district party committees with respect to activities that affect Federal elections, even if they may also have an impact on state elections or fail to mention a Federal candidate.

- Establishing a *de minimis* level of voter identification activities related to Federal elections that would nonetheless not be treated as "Federal election activity" under the Commission's regulations would be inconsistent with BCRA.

- The Commission poses questions aimed at delineating the precise boundaries between "get-out-the-vote activity" and "voter identification" -- in cases where a type of state, district or local party committee activity may arguably fit both definitions. As a practical matter, it will make no difference whether such activities are designated either "voter identification" or "get-out-the-vote activity" or both, for BCRA subjects state, district or local party committee spending on get-out-the-vote activities and voter identification to identical regulation. In some cases, activity that might be viewed as voter identification activity some months before an election would be considered get-out-the-vote activity in the days right before an election. We reiterate, however, that nothing in BCRA provides any basis for the proposition that an activity must occur relatively proximate to elections to constitute "get-out-the-vote activity**."**

(ii) "Generic campaign activity"

We agree with the proposed regulation, which refers to 11 CFR § 100.25.

(iii) "Get-out-the-vote activity"

The list of activities mentioned in the proposed regulation should be considered "examples" as of get-out-the-vote activity and not an exhaustive list of *all* get-out-the-vote activity. Thus, we approve the Commission's use of the language, "*Examples* of get-out-the-vote activity include . . ." (emphasis added).

We are concerned, however, that one of the listed examples is "contacting voters *on Election Day* or *shortly before* to encourage voting, *but without referring to any clearly identified candidate for Federal office*." (emphasis added). We strongly disagree with the suggestion that such voter contacts may constitute "get-out-the-vote activity" *only* if they occur "on Election Day or shortly before." Contacting voters to encourage voting is "get-out-the-vote activity" whenever it occurs. Likewise, the mention of a Federal candidate does not render an activity something other than "get-out-the-vote activity." Get-out-the-vote activity may refer to a Federal candidate in some instances, and as such, BCRA does not distinguish between activities that refer to Federal candidates and those that do not in using the term "get-out-the-vote activity." There are certain instances where get-out-the-vote activity that does not mention a Federal candidate can be paid for with a mixture of hard and soft money under the Levin amendment. But there is no reason for the definition of get-out-the-vote activity itself to reflect these limited circumstances.

Accordingly, we believe that the "contacting voters" clause of the proposed "get-out-the-vote activity" definition should be revised to read: "contacting voters to encourage voting, . . ."

In response to questions posed in the Commission's commentary on this proposed regulation:

- Establishing a *de minimis* level of get-out-the-vote activity that meets the clear statutory criteria for "Federal election activity," but would nonetheless not be treated as "Federal election activity" under the Commission's regulations is inconsistent with BCRA.

- The Commission inquires whether printed slate cards, sample ballots, and palm cards should properly be considered "get-out-the-vote-activity" or "public communications" (presumably, this question would only arise if such materials mentioned a Federal candidate). These three types of materials are traditionally associated with get-out-the-vote activity and, as such, should be considered "get-out-the-vote activity" rather than "public communications." Along these lines, proposed 11 CFR § 100.24(a)(2)(iii) appropriately lists slate cards, sample ballots and palm cards as examples of "get-out-the-vote activities."

BCRA's definition of "Federal election activity" covers get-out-the-vote activity, voter identification, and generic campaign activity "in connection with an election in which a candidate for Federal office appears on the ballot." *See* 2 U.S.C. § 431(20)(A)(ii).

The intent of this provision is that such activities be considered "Federal election activity" starting at the *beginning of a two-year Federal election cycle,* except in states holding regularly scheduled state elections in odd-numbered years. In those states such activities would only be considered "Federal election activity" starting after the odd-year, regularly scheduled state elections.

In his May 8th memo, Commissioner Thomas endorsed this approach, and it is consistent with the Commission's current practice with respect to allocation of generic voter drive and administrative expenses. Under that practice, state and local party spending on such activities must be allocated at the *beginning of a two-year election cycle* – except in the case of state and local parties located in the few states holding regularly scheduled state elections in odd-numbered years (in the latter case, unless a special election for Federal office is held during that non-Federal election year, all generic voter drive expenses in that year may be 100 percent non-Federal). *See* Federal Election Commission, "Campaign Guide for Political Party Committees," p. 48.

(a)(3) We support the language of proposed 11 CFR § 100.24(a)(3), which tracks the language of BCRA, as long as the terms "promote," "support," "attack," and "oppose" are properly interpreted and applied.

We note that there are major problems with proposed 11 CFR § 300.2(l), which defines and elaborates on when communications "promote," "support," "attack," or "oppose" a candidate for Federal office. Please refer to our comments on 11 CFR § 300.2(l) for further discussion.

(b) Proposed 11 CFR § 100.24(b) lists activities undertaken or financed by state, local, or district party committees that would not be treated as "Federal election activity." We note that this subsection does not merely re-state the express exceptions for certain types of state, local and district party committee activities contained in BCRA. In certain respects, it more generally elaborates on activities not covered under the definition of "Federal election activity."

We support proposed 11 CFR § 100.24(b)(1), which – as published in the Federal Register – essentially mirrors BCRA's exception for public communications referring solely to clearly identified candidates for state or local office. The Commission is correct to indicate that, under BCRA, such communications *would* be treated as "Federal election activity" if they constituted activity described in the voter registration or get–out-the-vote/voter identification/generic campaign activity prongs of "Federal election activity."

Along these lines, in its explanation of this exception, the Commission notes that the exception would not apply "to a telephone bank on the day before an election where there is a Federal candidate on the ballot and where GOTV phone calls are made to over 500 voters where the calls only refer to a State or local candidate." We agree with the Commission's conclusion that this specific example -- which deals with a type of "public communication" -- would not fall within proposed 11 CFR § 100.24(b)(1). However, we wish to clarify that a "get-out-the-vote" communication that did not rise to the level of a "public communication" (*e.g.*, telephone banking to less than 500 voters) nonetheless constitutes "get-out-the-vote activity" and must thus be treated as "Federal election activity."

We support the language of proposed 11 CFR § 100.24(b)(2), which tracks the language of the express exception contained in BCRA.

The Commission should delete the reference to "a similar meeting or conference" in proposed 11 CFR § 100.24(b)(3). BCRA's express exception, which was intended to be quite narrow, does not contain that language. It is unclear precisely what this language covers, and thus it opens the door to abuse.

We support the language of proposed 11 CFR § 100.24(b)(4), which tracks the language of the express exception contained in BCRA.

Proposed 11 CFR § 100.24(b)(5) accurately describes the type of voter registration activity that would not be covered by BCRA's definition of "Federal election activity."

To conform with that statutory language, proposed 11 CFR § 100.24(b)(6) should use the term "in connection with elections" rather than "in elections." Otherwise, it accurately describes the type of get-out-the-vote activity and voter identification that would not be covered by BCRA's definition of "Federal election activity" (*see* above discussion of when such activities should be considered "in connection with an election in which a Federal candidate appears on the ballot"). "Generic campaign activity" should be covered by this paragraph as well.

Proposed 11 CFR § 100.25, Definition of "Generic campaign activity"

Proposed 11 CFR § 100.25 correctly indicates that activities which support or oppose a political party without supporting or opposing specific candidates constitute "generic campaign activity" under BCRA.

None of the exempt activities under 11 CFR §§ 100.7(b)(9), (15), or (17) and 100.8(b)(8), (10) and (16) should be excluded from the definition of "generic campaign activity" (or, for that matter, from the definitions of any other type of "Federal election activity"). State, local or district party committee spending on the activities discussed in such exclusions will presumably continue not to be considered "contributions" or "expenditures" under the Act, as the case may be. However, to the extent such activities constitute "generic campaign activity," BCRA requires state, local and district party committees to finance them with exclusively hard money or a mixture of hard and soft money pursuant to the strict requirements of the Levin Amendment.

Proposed 11 CFR § 100.26, Definition of "Public communication"

In response to the question posed in the Commission's commentary concerning the Internet and e-mail, we note that BCRA contains no *per se* exclusion from the definition of a "public communication" for political party Internet or widely distributed e-mail communications. A broad *per se* exclusion of that nature would be problematic, permitting state and local party entities to exploit rapidly developing technology and new communications media to re-create or prolong the current soft money system. In light of the complexities of this area, we urge the Commission to proceed carefully in delineating the scope of FECA's and BCRA's coverage with respect to Internet and e-mail communications, so that appropriate disclosure requirements and funding restrictions apply to public communications by political party committees via electronic means.

Proposed 11 CFR §§ 100.27, 100.28, Definitions of "Mass mailing" and "Telephone bank"

The proposed definitions of "mass mailing" and "telephone bank" both specify that "[f]or purposes of this section, *substantially similar* means communications that have been personalized to include the recipient's name, occupation, geographic location, or similar types of individualization." In its commentary, the Commission further explains that mail or telephone communications would be considered "substantially similar" if they would be the same but for personalization to include the recipient's name, occupation, geographic location, or similar variables.

This concept of "substantially similar" is too narrow, as it appears to apply only to communications that are identical in substance and vary merely with respect to information describing the specific addressee or recipient. Under the proposed definition, inserting a new sentence in every 499th letter could insulate large blocks of otherwise identical letters sent out

within 30 days of one another from being deemed a "mass mailing" under BCRA. Likewise, the concept is too narrow to account for virtually any telephone banking, given that the substance of telephone conversations will vary even when the call's initiator works off of a standard script. The Commission should modify the "substantially similar" standard to account for mailings and telephone calls that include a certain amount of substantive variation, in addition to or separate from variation with respect to information describing the recipient.

Proposed 11 CFR § 102.5, State, district, or local party committee accounts

Proposed 11 CFR § 102.5(a)(1)(i) contains a mistaken cross-reference when it states that no transfers may be made to the Federal account of a political committee for the purpose of financing activity in connection with non-Federal elections, "except as provided by 11 CFR § 300.34 and § 106.6(e)." In fact, proposed 11 CFR § 300.33(d) deals with transfers from a state, district or local party committee's non-Federal or Levin accounts to its Federal account and thus should be cross-referenced here instead of "11 CFR 300.34."

Proposed 11 CFR § 102.5(b)(2) conflicts with other sections of the regulations when it appears to permit state, district or local party organizations that are not Federal political committees to have a single account in which they may pool hard money funds, Levin funds, and other non-Federal funds, provided they can demonstrate that they have sufficient hard money and Levin funds to make contributions, expenditures, or payments for Federal election activity. However, proposed 11 CFR § 300.30(b)(1) expressly states that any state, district or local party committee, "whether or not it qualifies as a political committee under the Act," must maintain a separate account in a depository (known as a "Levin account") to disburse non-Federal funds on certain types of Federal election activity. Likewise, proposed 11 CFR § 106.5(b) anticipates that party organizations that are not political committees will make Levin payments from a "separate account" (*i.e.*, "separate" from any account which pooled Federal funds and non-Federal funds that were not Levin funds).

We support proposed 11 CFR § 300.30(b) and 11 CFR § 106.5(b) in this respect. Accordingly, the Commission should modify and conform proposed 11 CFR § 102.5(b)(2) to require party committees that are not political committees to establish separate Levin accounts.

With regard to proposed 11 CFR § 102.5(b)(2), we agree that national party committees should not be included in this section because they are prohibited from raising or spending non-Federal funds.

Proposed 11 CFR § 102.17, Joint Fundraising by committees other than separate segregated funds

We support the added introductory language, which clarifies that nothing in this section dealing with joint fundraising by committees other than separate segregated funds authorizes or permits a person to engage in conduct that would violate any of the provisions of 11 CFR part 300. 11 CFR part 300 is of primary importance, as it implements the party and candidate soft money prohibitions of BCRA.

Proposed 11 CFR § 104.8, National party reporting from November 6, 2002 through December 31, 2002

We agree with the additional language in proposed 11 CFR § 104.8(e) and (f) to make clear that national committees must continue to file disclosure reports for their soft money accounts covering the period through December 31, 2002.

Proposed 11 CFR § 104.9, Requirements for the uniform reporting of disbursements

We agree with the additional language in proposed 11 CFR § 104.9(c), (d), and (e) to make clear that national committees must continue to file disclosure reports for their soft money accounts covering the period through December 31, 2002.

Proposed 11 CFR § 104.10, Reporting by separate aggregate funds and nonconnected committees of expenses allocated among candidates and activities

Our understanding is that the current regulation was modified to cover the reporting of allocated expenditures and disbursements solely by separate segregated funds and nonconnected committees. The section had previously dealt also with reporting of political party allocated expenditures and disbursements. However, under the proposed regulations, reporting with respect to such spending would now be governed by 11 CFR § 104.17 and 11 CFR § 300.36. Based on our understanding that no substantive changes have been made regarding required reporting of allocated expenditures and disbursements by separate segregated funds and nonconnected committees, we support the proposed changes to this section.

Proposed 11 CFR § 104.17, Reporting of allocable expenses by party committees

Proposed 11 CFR § 104.17(a) should require state, district or local party committees making expenditures and disbursements on behalf of clearly identified Federal and non-Federal candidates to report the allocation (*i.e.*, for allocated expenditures, the amount of each in-kind contribution, independent expenditure, or coordinated expenditure attributed to each candidate) among all named candidates "pursuant to 11 CFR 106.1" – just as would be required of national party committees. As reflected in this regulation, BCRA requires that state, district and local committees of political parties making expenditures and disbursements for Federal election activity on behalf of clearly identified Federal and non-Federal candidates use entirely Federal funds to make payments for that activity.

We defer to the Commission on the issue of requiring the assignment of unique identifying codes to some allocable activities. We do generally believe that there is significant utility in greater specificity in reporting.

In addition, in response to the question posed by the Commission in the commentary, we strongly support electronic filing, and believe any such requirements for party committees should cover reporting of Federal election activity by state parties.

Proposed 11 CFR § 106.1, Allocation of expenses between candidates

Proposed 11 CFR § 106.1 states that party committees may use only Federal funds for payments involving both expenditures on behalf of clearly identified Federal candidates and disbursements on behalf of one or more clearly identified non-Federal candidates. BCRA requires this result.

Proposed 11 CFR § 106.5, Allocation of expenses between Federal and non-Federal activities by party committees

We support proposed 11 CFR § 106.5.

Proposed 11 CFR § 108.7, Effect on State Law

We support proposed 11 CFR § 108.7(c)(6), which clarifies that FECA (as amended by BCRA) does not supersede state law regarding the application of state law to the funds used for the purchase or construction of a state or local party office building *to the extent described in proposed 11 CFR § 300.35.* Please see our discussion of proposed 11 CFR § 300.35 later in these comments regarding the scope of non-preemption in this area.

Proposed 11 CFR § 110.1, Contributions by persons other than multicandidate political committees

We support proposed 11 CFR § 110.1, which implements BCRA's increase from $5,000 to $10,000 of the maximum aggregate annual contribution (in Federal funds) that a person may make to a state political party committee. As specified in the proposed regulation, this hard money limit increase would take effect on January 1, 2003.

Proposed 11 CFR § 300.1, Scope, effective date and organization

We support proposed 11 CFR § 300.1.

Proposed 11 CFR § 300.2, Definitions

(a) We support this definition of a "501(c) organization that makes expenditures or disbursements in connection with a Federal election." The Commission should consider adding to the list of activities in the definition if future events warrant it.

(b) The Commission's proposed definition of the term "agent" is incorrect. The term "agent" is used a number of times in the BCRA to make more complete and effective the prohibitions of

the Act on certain entities raising or spending soft money. For example, national parties and federal candidates and officeholders are prohibited from raising or spending soft money. These prohibitions could easily be avoided if agents of those entities could continue to raise and spend soft money.

It is therefore critical that the term "agent" be construed to include anyone who has an agency relationship with the entity under the common law understanding of that term. The proposed definition that limits agents to those who have actual and express authority to act for the principal would undermine the purpose and intent of BCRA. It would allow parties and candidates to avoid the prohibitions of the new law through the use of staff or intermediaries as long as they never expressly authorize the raising of soft money on their behalf.

As noted in the commentary, current Commission regulations include a definition of agent for purposes of the definition of independent expenditure. *See* 11 CFR § 109.1(5). This definition is broader than the proposed definition for the soft money regulations in that it covers individuals who have implied authority to act for the principal or who have a position within the campaign organization where it would reasonably appear that they may authorize expenditures. We see no justification for a narrower definition for these soft money regulations, particularly given the reason that the term "agent" is used in the statute.

The concept of apparent authority is an important one to include in the definition because candidates and parties must take seriously their responsibility to make sure that their employees are familiar with and follow the new law. In the political world, many individuals have titles or positions that lead the general public or potential donors to believe that they are acting on behalf of candidates or parties. When that is the case, the candidate or party must be held accountable for the actions of those individuals. At the very least, if the principal is aware of the activities of the agent, the principal must be held responsible for those activities, even if the activities are not expressly authorized.

In response to a few of the specific questions posed by the Commission in the commentary, we believe that while paid employees certainly will be agents of a candidate, the definition of agent should not exclude vendors or volunteers from also being agents. In addition, if a principal has knowledge that a volunteer is making impermissible solicitations, the principal should be held liable for those solicitations, even if the volunteer is acting without actual authority.

(c) The term "directly or indirectly establish, finance, maintain, or control" is another concept used frequently in BCRA to make comprehensive and effective the prohibition on raising or spending soft money in Federal elections. Again, if national parties or Federal candidates or officeholders could avoid the major new prohibitions of BCRA with respect to soft money by simply setting up a new organization or controlling or financing an existing organization, then the soft money ban would be ineffective from the very start. This term must therefore also be appropriately construed in the regulations.

The term is used in the statute in two places that are not reflected in the proposed definition. First, it is used in 2 U.S.C. § 441i(a)(2) concerning national parties. Second, it is used in 2 U.S.C. § 441i(b)(2)(B)(iii), which concerns who can give so-called Levin money to the state parties. Therefore, the definition should state: "This paragraph applies to *national*, state, ... and holders of Federal office, and *donors of Levin funds*, which shall be referred to ...."

The proposed definition properly recognizes that analysis of a variety of factors will be necessary to determine if an entity is "financed" by a sponsor. It seems to limit that analysis to funding "provided" by the sponsor, which suggests that only funds actually given to the entity by the sponsor are significant. We believe that entities are also "financed" by the sponsor (and perhaps even would be controlled by the sponsor) if the sponsor is responsible for *raising* a significant percentage of the entity's budget. One section of the proposed definition appears to recognize this when it speaks in subparagraph (c)(1)(iii) of providing "a significant amount of funding by contribution ... *or other means*." The concept of "fundraising" should be specifically added to the definition in subparagraphs (c)(1)(iii)(A), (B), and (C).

There is nothing in the statutory language that permits the term "established, financed, maintained, or controlled" to apply only to entities established after the effective date of the Act, and we did not intend such a distinction. Indeed, Sen. Feingold referenced the term in discussing why the soft money ban would prohibit existing 527 organizations established by federal officeholders from raising soft money. *See* Cong. Rec. S12667-68 (Oct. 15, 1999) (colloquy between Sen. Feingold and Sen. Torricelli concerning efforts to evade the soft money ban). There should be no presumption that preexisting organizations were not "established, financed, maintained, or controlled" by the sponsor. Such a presumption would create an obvious loophole for organizations established or controlled by members of Congress that are currently raising soft money. We intend that such organizations may not raise or spend soft money after November 5, 2002.

In addition, while we can conceive of organizations founded or financed by Federal candidates or officeholders attaining a status under which they would no longer be prohibited from raising or spending soft money, the Commission should not be making any judgments that undermine the central purpose of the BCRA – a total ban on Federal candidates and parties raising or spending soft money. A *per se* rule or even a presumption based on the amount of time that has passed since a Federal candidate was involved with the organization is not appropriate. The Commission's Advisory Opinion process provides a reasonable way for the Commission to entertain arguments on a case by case basis that certain organizations are no longer subject to the restrictions.

(d) Proposed 11 CFR § 300.2(d) defines a "disbursement" as "any purchase or payment made *by a political committee or organization that is not a political committee*." (emphasis added). We are troubled by the proposed concept of limiting the definition of "disbursements" to purchases or payments made by *political committees* or *organizations*. While we have not catalogued every use of the term "disbursement" in these extensive regulations, the term may at some point be used to describe spending by individuals or entities that do not constitute "organizations."

Regardless, the term "disbursement" should simply be defined as "any purchase or payment." The preceding and subsequent regulations would then determine precisely the individuals and entities that might, in certain circumstances, be prohibited from making, or authorized to make, "disbursements."

(e) Proposed 11 CFR § 300.2(e) defines "donation", for purposes of part 300, as "a payment, gift, subscription, loan, advance, deposit or anything of value given to a non-Federal candidate or a party committee, but does not include contributions or transfers." Limiting the scope of the term "donations" to amounts given to non-Federal candidates or party committees is inconsistent with BCRA. BCRA clearly contemplates that "donation[s]" may be given to other entities as well. For example:

- As indicated by proposed 11 CFR § 300.10 , national parties may not "solicit . . . or direct *to another person* a . . . . donation . . . that [is] not subject to the prohibitions, limitations, and reporting requirements of the Act." (emphasis added)

- As indicated by proposed 11 CFR §§ 300.11, 300.37, 300.50, and 300.51, national, state, district and local party committees may not "make or direct any donations to . . . *an organization that is described in 26 U.S.C. 501(c) and exempt from taxation under section 26 U.S.C. 501(a) and that makes expenditures or disbursements in connection with an election for Federal office* . . ." (emphasis added)

In accordance with BCRA, the Commission must define the concept of a "donation" as "a payment, gift, subscription, loan, advance, deposit or anything of value given to *a person*, but does not include contributions or transfers." The following sections of part 300 would then determine precisely the entities to or for which it would be impermissible for party committees and certain other political actors to solicit, direct or transfer such "donations" in certain circumstances.

The Commission's exclusion of "transfers" from the definition of "donations" may be problematic. For example, 11 CFR § 300.31(e) correctly indicates that a state, district, or local committee of a political party must not accept or use for financing Levin activities any "donations . . . that are . . . transferred" by party committees and Federal candidates. If "donations" do not encompass "transfers," this provision and potentially others are at a minimum confusing and may actually open loopholes.

The commentary does not explain the decision to exclude "transfers" from the scope of the term "donation." To the extent this decision reflects a desire to continue allowing party committees to transfer Federal funds among themselves without limitation (provided that such transferred funds are not used as the Federal component of allocated spending on Levin activity), it is not clear to us that this would be prohibited even if "transfers" were included in the definition of "donations." Notably, the provisions prohibiting party committees from making "donations" to 527 organizations contain exceptions for donations to political committees and state, district or local committees of a political party. *See* proposed 11 CFR §§ 300.11, 300.37, 300.50, and

300.51. Absent a clear and important rationale for the proposed exclusion, we believe that "transfers" should not be excluded from the definition of "donations."

In response to questions posed by the Commission, we note that the scope of the term "donation" is deliberately broader than that of the term "contribution." For this reason, and in light of the absence of any exceptions to the term "donation" provided in BCRA, the Commission must not automatically exclude from the concept of a "donation" activities exempt from the definition of a "contribution" pursuant to 11 CFR § 100.7(b). At the same time, solely with respect to the use of the term "donation" in the proposed regulations to describe amounts provided to a state, district or local party committee for Levin activities, the Commission would have the flexibility not to treat volunteer services provided without compensation to such party committees and very closely analogous activities as "donations."

(f) Proposed 11 CFR § 300.2(f) should allow *only* Federal funds to deposited into a Federal account, except for deposits of Levin or other non-Federal funds solely for the purpose of making allocated disbursements.

(i) Proposed 11 CFR § 300.2(i) should clarify that Levin funds may be spent on *only* that "Federal election activity" which is described in 2 U.S.C. § 431(20)(A)(i)&(ii), as well as on non-Federal activity (subject to state law).

(l) We strongly disagree with proposed 11 CFR § 300.2(l), which defines and elaborates on when communications "promote, support, attack or oppose" a candidate for Federal office.

Proposed 11 CFR § 300.2(l)(1) incorrectly construes when communications "promote, support, attack or oppose" a Federal candidate. The proposed definition significantly narrows the scope of these terms from their plain meaning. Because the meaning of these statutory terms is clear, it is not necessary for an extensive additional regulatory definition to be developed. The Commission should apply the statutory language to the fact situations it encounters using a broad nexus test that captures public communications that tend to increase support for or opposition to Federal candidates. If the Commission wishes to write a regulatory definition to repeat the terms used in the statute and and/or elaborate on their parameters, it must ensure that the definition is consistent with the plain meaning of those terms.

The terms "promotes," "supports," "attacks," and "opposes" are used in BCRA in describing the nature of public communications financed by state, local and district party committees that constitute "Federal election activity." Specifically, BCRA prohibits state, local or district party committees from spending soft money (including Levin funds) on any:

> "public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that *promotes* or *supports* a candidate for that office, or *attacks* or *opposes* a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)."

2 U.S.C. § 431(20)(A)(iii) (emphasis added).

This provision lies at the core of BCRA's mission to end the prevailing soft money system. Under this system, state parties use soft money received directly from donors or the national political parties to finance advertisements that do not contain express advocacy but by design and effect influence Federal elections. In doing so, they make a mockery of existing campaign finance laws that require hard money to be used for expenditures in connection with a Federal election.

The "public communications" prong of BCRA's definition of "Federal election activity" gives effect to the law's long-standing intent with respect to party advertising. Notably, it rejects the notion that only state party communications expressly advocating a vote for or against a Federal candidate constitute "Federal election activity." Instead, the statute sweeps much more broadly, covering public communications that refer to a clearly identified candidate for Federal office and promote, support, attack or oppose a candidate for that office, whether or not they contain express advocacy.

This provision reflects the realities of today's campaigns and is constitutionally appropriate. When political parties undertake to support, promote, attack or oppose Federal candidates in advertisements, it is abundantly clear that those advertisements are intended to influence Federal elections. In *Buckley v. Valeo*, the U.S. Supreme Court noted that spending by political committees – such as the political parties – is "by definition, campaign related." *See* 424 U.S. 1, 79 (1976). For this reason, the Court created the express advocacy test to apply only with respect to certain *non-party* entities whose spending is *not* by definition campaign-related. The Court has never suggested that regulation of political party spending should be subject to the express advocacy test.

The Commission's proposed definition of "promote, support, attack, or oppose" does not reflect the clear meaning of those terms or the purpose for which they were used in the statute. It therefore constitutes an incorrect interpretation of BCRA and must not be included in the final rule.

Specifically, the proposed regulation requires a communication to "encourage[ ] action to elect or defeat a candidate" to constitute a communication promoting, supporting, attacking or opposing a Federal candidate. As a practical matter, the proposed definition may fail to cover a state party advertisement that does no more than favorably or unfavorably describe a clearly identified Federal candidate's views – an advertisement that at least on its face does not encourage "action" to elect or defeat that candidate. Nonetheless, that advertisement patently "supports", "promotes", "attacks" or "opposes" the candidate under the plain meaning of those terms and is thus among the class of public communications covered by this provision.

The Commission has experience in applying a more accurate and complete understanding of the terms "promote," "support," "attack," or "oppose." Its former "electioneering message test"

covered statements "which would tend to diminish support for one candidate or garner support for another candidate." *See* Commissioner Sandstrom's Statement of Reasons in MUR 4553, at 9. Applying this test during the 1984 presidential elections, the Commission found that negative advertisements which showed the image of a Democratic presidential candidate and quoted his statements about the budget deficit or government morality had the intent and effect of "diminish[ing] support for any Democratic Party presidential nominee and garner[ing] support for whoever may be the eventual Republican Party nominee." *See* A.O. 1984-15. We urge the Commission again to assign proper meaning to the terms "promote," "support," "attack," and "oppose," in order to effectuate BCRA's provisions preventing state parties from using soft money for advertisements that influence Federal elections.

The list of communications in proposed 11 CFR § 300.2(l)(2) that would not be treated as promoting, supporting, attacking, or opposing a Federal candidate is likewise problematic and often contradicts BCRA.

Proposed 11 CFR § 300.2(l)(2)(i) indicates that a communication does not promote, support, attack or oppose a candidate for Federal office if it is made in connection with an election for state or local office and does not refer to any candidate for Federal office. Under BCRA, this type of communication would certainly not be covered by the "public communications" prong of "Federal election activity" – which addresses only communications that refer to a clearly identified candidate for Federal office. However, proposed 11 CFR § 300.2(l)(2)(i) cuts more broadly, stating that such communications do not promote, support, attack or oppose a candidate for Federal office. To properly implement BCRA, this exclusion should be deleted. The concept that communications not referring to clearly identified Federal candidates do not fall under the "public communications" prong of "Federal election activity" is more properly developed in the regulations identifying activities that do not constitute "Federal election activity" (*see* discussion above of proposed 11 CFR § 100.24(b)(1)).

Furthermore, BCRA contains no *per se* exclusions from the "public communications" prong of "Federal election activity" for certain categories of communications that refer to a clearly identified candidate for Federal office. Rather, it covers all public communications that refer to a clearly identified candidate for Federal office and *promote*, *support*, *attack* or *oppose* a candidate for that office.

Whether or not a communication referring to a clearly identified Federal candidate promotes, supports, attacks or opposes that candidate depends on the totality of the communication. The *per se* exclusions proposed in 11 CFR § 300.2(l)(2)(ii) do not permit the comprehensive analysis required to determine whether certain communications in fact support, promote, attack or oppose clearly identified Federal candidates. These *per se* exclusions are thus inconsistent with BCRA and should be deleted.

An advertisement that mentions that a Federal candidate has endorsed a state or local candidate will not be covered by the "public communications" prong of "Federal election activity" if it does not promote, support, attack or oppose the Federal candidate (*e.g.*, an advertisement simply

stating that "Senator Smith endorses Jones for Governor"). We also note that subparagraph (l)(2)(ii)(A) exempts certain communications in which a Federal candidate "endorse[s] another Federal . . . . candidate." The reference to endorsement of a Federal candidate by another Federal candidate should be deleted. Communications containing such endorsements clearly promote or support the endorsed Federal candidate and thus fall under the "public communications" prong of "Federal election activity."

Moreover, the exclusion discussed in proposed 11 CFR § 300.33(l)(2)(ii)(B) contradicts BCRA. A state's Governor, for example, could appear in an advertisement, characterize his positions on one or multiple issues in an extremely favorable manner, and then state: "I disagree with Senator [X]'s stands on all these issues." This advertisement clearly attacks or opposes the referenced Federal candidate.

Finally, a *per se* exclusion for references to a bill by a popular name containing the name of a Federal candidate would be inconsistent with BCRA. Public communications that mention the name of a Federal candidate in the course of referring to legislation by its popular name will not be covered by the "public communications" prong of Federal election activity, so long as they do not in any respect promote, support, attack or oppose the Federal candidate. Certain communications that refer only to a Federal candidate in mentioning a popular bill name could very well, however, promote, support, attack or oppose that candidate.

This particular exclusion could also serve to exempt from treatment as "Federal election activity" ads that cleverly invent new "popular names" for bills that include the names of Federal candidates involved in races clearly targeted by the parties.

Instead of proposing the *per se* exclusions discussed above, the Commission could indicate in proposed 11 CFR § 100.24 that a public communication containing a Federal candidate's endorsement of a state or local candidate, or a public communication mentioning a Federal candidate in the course of stating a bill's or law's true popular name, does not *per se* fall under the public communications prong of "Federal election activity." Such communications must promote, support, attack or oppose the Federal candidate to be considered within that prong of "Federal election activity."

(m) As drafted, the proposed definition of "solicit or direct" incorrectly interprets these important terms. This definition seems to cover only a suggestion that a person make a contribution. Thus, the definition must be modified to include the concept of suggesting to whom an already willing contributor should send a contribution. In addition, there is no statutory basis for limiting the definition to suggestions made to candidates, political committees, or non-profits. Certain prohibitions in the act apply to soliciting contributions from any "person," which would obviously include individuals and corporations. *See, e.g.*, 2 U.S.C. § 441i(a)(1). The definition must be modified accordingly.

We have no objection to the proposed rule's indication that merely "providing information or guidance as to the requirements of applicable law" does not constitute a solicitation. On the

other hand, we strongly oppose the broader safe harbor on which comment is sought in the commentary. Allowing parties or candidates to respond to "unsolicited requests for information" would open a major loophole in the soft money ban. A major donor could say to the national party chairman, "I know I can't give you this check for a million dollars, but what state party is most in need of support for GOTV efforts that will help our presidential candidate?" We believe that responding to that question would constitute directing the contribution to that state party.

We also believe that the concept of soliciting or directing a contribution must be broad enough to cover a series of conversations that amount to solicitation or direction even if any single conversation in that series does not. Limiting the analysis to each individual conversation will only encourage gamesmanship and evasion.

Proposed 11 CFR § 300.10, General prohibitions on raising and spending soft money

We support proposed 11 CFR § 300.10. We note in response to a point in the commentary that the soft money ban prohibits the national parties from raising soft money for any person. It therefore does prohibit the national parties from raising or directing soft money contributions for or to host committees for the political conventions. We note with respect to future rulemaking on political conventions that BCRA places tight restrictions on the use of soft money for political conventions.

Proposed 11 CFR § 300.11, Prohibitions on fundraising for and donating to certain tax exempt organizations

We support this section of the proposed rule. The regulations reflect our intent to prevent evasion of the statutory prohibition of national party committees soliciting soft money for or directing soft money contributions to 501(c) organizations that are involved in Federal elections or 527 organizations (other than political committees, other party committees, or state or local candidates). We believe the definition of a "501(c) organization that makes expenditures in connection with a federal election" in proposed 11 CFR § 300.2(a) is adequate to carry out this intent.

We agree with the suggestion in the commentary that it would go beyond congressional intent to prohibit national parties from raising money for a 501(c) organization that has at any time ever in the past been involved in Federal elections. We believe that three election cycles is an appropriate "cooling off period" to ensure that the purpose of the provision is not evaded. However, a party should be strictly liable in a case where an organization seeking its fundraising assistance misrepresents its past activities or future plans, unless the organization has filed a certification with the Commission that would make it liable for a false statement under 18 U.S.C. § 1001. The Commission should also entertain advisory opinion requests based on such certifications so that parties and organizations can be sure that they are complying with the law.

Thus, a safe harbor for the party is appropriate only if the organization that it plans to assist in ways that might otherwise be prohibited under BCRA has filed a certification with the

Commission that it has not engaged in activities in connection with an election for Federal office, for the past three election cycles and does not plan to do so during the current election cycle.

Proposed 11 CFR § 330.12, Transition rules

We agree with the general approach of proposed 11 CFR § 330.12(a) through (d), which clarifies that non-Federal funds can never be used for Federal expenditures and that the Commission's current allocation rules will continue to apply to any disbursement of non-Federal funds during both the pre-November 6, and post-November 6 periods.

With regard to proposed 11 CFR § 330.12(e), it was our intent that after November 5, 2002, funds in the national parties building fund accounts would no longer be used for "any" office building or facility, not just for national party office buildings. *See* BCRA § 403(b)(2)(B)(iii). The second sentence of this subsection should therefore read: "After November 5, 2002, the national committees may no longer accept funds into such an account and must not use such funds for the purchase or construction of any office building or facility."

In addition, there is no statutory basis for the transfer of excess funds remaining in the building accounts (or in other non-Federal accounts for that matter) as of November 6, 2002, to non-profit organizations. Because it is at least possible that significant funds may remain in these accounts, we believe that allowing such funds to be donated to non-profits would create the potential for those funds to be used for Federal election purposes in the next election cycle, which would be directly contrary to a central purpose of the law – to prohibit soft money raised by the national parties from being used in the 2004 elections.

Therefore, any money remaining in these accounts should be either disgorged to the United States Treasury, or returned *pro rata* to the donors. There is no basis in the statute for allowing excess funds to be given to non-profits that make expenditures or disbursements in connection with a Federal election.

Proposed 11 CFR § 300.13, Reporting requirements

We agree with this provision, which tracks the statutory language. We agree that termination reports for national party soft money accounts should be required. The use of the term "subordinate committee" in the statutory language was intended to ensure that new committees created by the national party committees would file the required reports and that existing entities that are subordinate committees to the national party committees, such as the College Democrats or College Republicans and similar groups, report their receipts and expenditures, whether or not they are required to do so under previous law.

Proposed 11 CFR § 300.30, Accounts

(a) Proposed 11 CFR § 300.30(a)(2) permits a state, district or local party organization that does not qualify as a political committee under 11 CFR § 100.5 and that finances political activity in connection with both Federal and non-Federal elections to either establish a Federal account in a depository or demonstrate that it has sufficient Federal funds to make any contributions or expenditure under the Act. In the event such party organizations choose the latter option, we urge the Commission to be vigilant in ensuring that these organizations do have sufficient Federal funds to make any contribution or expenditure.

Proposed 11 CFR § 300.30(a)(6) requires state, local and district party committees to make allocable expenditures and disbursements in entirety from their Federal accounts, with any non-Federal share of such costs transferred to the Federal account from a Levin account or a non-Federal account within the current set time frames. We support continuation of this well-established requirement for making allocable expenditures and disbursements – though the Commission should continue to permit, as an alternative, such party committees to establish separate allocation accounts for purposes of making allocated expenditures and disbursements. In that scenario, there must be two separate allocation accounts – one for use in financing Levin activities, and another for use in financing administrative costs and other non-Levin allocated costs. Furthermore, proposed 11 CFR § 300.30(a)(6) should cross-reference "11 CFR 300.33" rather than "11 CFR 300.34" – subsection (d) of the former covers "Transfers between accounts to cover allocable expenses."

Proposed 11 CFR § 300.30(a)(8) permits state, district or local party committees to make non-Federal disbursements from their Federal accounts. We agree that these party committees may use Federal funds for non-Federal activities, *subject to state law* (*see* proposed 11 CFR § 300.30(b)(3)). State law, however, is not referenced in this paragraph. It must be referenced to clarify that Federal funds may not be used for non-Federal activities where doing so would violate state law.

(b) Proposed 11 CFR § 300.30(b)(1) requires that state, district or local party committees, whether or not they qualify as political committees, maintain separate "Levin accounts" if they intend to engage in voter registration, voter identification, get-out-the-vote activity, and/or generic campaign activity. We strongly support this requirement in the case of any such committee that intends to spend non-Federal funds on these activities. Levin funds are subject to an intricate set of restrictions relating to their solicitation, receipt, and disbursement. The maintenance of a separate account for these funds is essential to determining and ensuring compliance with these restrictions.

Mere accounting procedures will *not* adequately ensure compliance with these restrictions were Levin funds pooled with Federal funds or other non-Federal funds. Along these lines, it would not be appropriate to leave to each committee the decision of whether or not to set up a separate Levin account. Likewise, requiring state parties to maintain a Levin account but only *recommending* that district or local parties do so would significantly undermine compliance with BCRA and thus be unreasonable and inappropriate. Notably, local and district party committees are subject to the Levin solicitation, receipt and disbursement restrictions to the same extent as

are state party committees. Finally, it is clear that three separate accounts would promote greater transparency with respect to state, local and district party fundraising and campaign activity.

Proposed 11 CFR § 300.30(b)(3) indicates that state, district or local party committees may use their Levin accounts to finance "the category of activities described at 11 CFR 300.32 or for other, non-Federal activities permissible under State law." It should be clarified here that Levin funds may *not* be used for "Federal election activity" other than the activities described in proposed 11 CFR § 300.32(b)(1). For example, revised language could read that "a state, district or local party committee may use its Levin account to make expenditures or disbursements for *only those categories of Federal election activity* described in 11 CFR 300.32(b)*(1),* and for other, non-Federal activities permissible under state law." This would permit state, district and local party committees to use their Levin account to finance only those Federal election activities described in 11 CFR § 300.32(b)(1) (subject to the restrictions contained in that section and in other sections of this subpart), other activities that must be allocated under 11 CFR § 300.33 (*e.g.,* administrative expenses), and exclusively non-Federal activities (that do not require any allocation), if permissible under state law.

Proposed 11 CFR § 300.30(b)(4)(ii) should include the word "and" after the semicolon at the end (rather than "or") – to clarify, as the subparagraph elsewhere suggests, that the state, district or local party committee may use its Levin account to make disbursements only if *all* of the following conditions are met.

Proposed 11 CFR § 300.31, Receipt of Levin funds

Proposed 11 CFR § 300.31(c) expressly authorizes a state, district or local party committee to solicit and accept donations of Levin funds "from a source prohibited by the Act and this chapter", if permissible under state law. While this concept is largely correct (*e.g.*, as noted by the Commission, with respect to corporate or union treasury contributions in accordance with the donation amount limitations of the following subsection), it could be interpreted to allow such party committees to receive donations from foreign nationals in connection with elections. In fact, BCRA's Levin Amendment provisions do *not* undo or modify the pre-emptive effect of 2 U.S.C. § 441e, which prohibits foreign nationals from making a "donation of money or other thing of value . . . in connection with a Federal, state or local election" and prohibits any person from soliciting, receiving, or accepting such a donation from a foreign national. We do not believe the Commission intended to override 2 U.S.C. § 441e and strongly urge that this subsection be revised to clarify that state, district, or local party committees may not accept Levin funds from foreign nationals.

Proposed 11 CFR § 300.32(c) would determine whether someone a person is "established, financed, maintained, or controlled" by another person, for purposes of the proposed paragraph dealing with Levin fund donation restrictions.

Proposed 11 CFR § 300.31(e) seeks to implement the requirement that a state, district, or local party committee may not accept or use as Levin funds any amounts that were solicited, received,

directed, transferred, or spent by or in the name of any person described in 2 U.S.C. § 441i(a) or (e). However, contrary to the language of BCRA, it currently fails to prohibit state, district or local party committees from accepting or using as Levin funds amounts solicited, received, directed, transferred or spent by or in the name of *an officer or agent acting on behalf of a national party committee, and any entity that is directly or indirectly established, financed, maintained or controlled by a national party committee.* These individuals and entities must be added to the coverage of proposed 11 CFR § 300.31(e)(1). Likewise, to accurately reflect BCRA, 11 CFR § 300.31(e)(2) should also prohibit state, district or local party committees from accepting or using as Levin funds amounts solicited, received, directed, transferred, or spent by or in the name of an "agent of a candidate or individual from holding Federal office." The language currently covers only Federal candidates and officeholders and certain entities they establish, finance, maintain or control.

Proposed 11 CFR § 300.31(f) prohibits a state, district or local party committee from raising Levin funds "by means of joint fundraising with any other State, district or local committee of a political party or the agent of such a committee." BCRA also prohibits a state, district or local committee of a political party from receiving Levin funds through fundraising activities conducted by other state, local, or district party committees on its behalf (or on behalf of its agents). This latter concept must be incorporated to the regulation.

We note that proposed 11 CFR § 300.31(f) states that the use of a common vendor for fundraising by more than one State, district or local committee of a political party, or the agent of such a committee, shall not "by itself" be deemed joint fundraising. We agree with this statement and likewise concur in the implicit acknowledgment that the use of a common vendor may very well be a means of carrying out actual "joint fundraising" schemes that violate the prohibition of this section. Accordingly, we believe that the Commission should be highly attentive to the particular use of common vendors in assessing compliance with this section.

We also believe that this section, which deals with the "Receipt of Levin funds," should at least expressly cross-reference proposed 11 CFR § 300.34(b). The latter section prohibits state, district or local party committees from using as Levin funds any funds transferred or otherwise provided to the committee by any other state, district or local party committee and national party committees (and certain entities and agents associated with such committees). This is an extremely important restriction regarding the nature of funds which may properly be deposited into a Levin account.

Proposed 11 CFR § 300.32, State, local and district party committee expenditures and disbursements

(a) Proposed 11 CFR § 300.32(a)(3) must be revised to conform with the relevant section of BCRA – which states that "An amount spent by a [state, district or local party committee] to raise funds that are used, in whole or in part, for expenditures or disbursements for a Federal election activity shall be made from [Federal funds]." 2 U.S.C. § 441i(c). This means that a state party fundraising activity must be financed exclusively with Federal funds if amounts raised by virtue of that activity are ultimately disbursed in whole *or in part* for "Federal election activity" (*e.g.,* the state party could not allocate the costs of a fundraising activity which raises funds that are ultimately disbursed for both Federal election activity and other activities). This concept is not precisely captured in the proposed regulation – which refers to fundraising "for Federal activities."

(b) and (c) The language in proposed 11 CFR § 300.32(b)(2) permitting the disbursement of Levin funds on "any use that is lawful under the laws of the state in which the committee is organized" – and then specifying that the Levin funds in such instance need not comply with any of the requirements of proposed 11 CFR § 300.32(c) – could give rise to inconsistencies with BCRA and other problematic results.

For instance, one potential interpretation of proposed 11 CFR § 300.32(b) is that state, district and local party committees may spend Levin funds on *any* "Federal election activity" – not merely those enumerated in paragraph (1) of that subsection -- so long as it constituted a "use that is lawful under the laws of the state in which the committee is organized." Under BCRA, the activities described in proposed 11 CFR § 300.32(b)(1)(i) and (ii) are the *only* "Federal election activities" for which Levin funds may be disbursed.

In addition, read in combination, 11 CFR § 300.32(b)(2) and (c)(3) could be interpreted to suggest that, in the event Levin funds are disbursed for activities lawful under state law that do not constitute "Federal election activity", then they need not constitute funds raised in accordance with proposed 11 CFR § 300.31. In fact, Levin funds *must* in all circumstances be raised in accordance with proposed 11 CFR § 300.31 (*see* the proposed definition of "Levin funds" at proposed 11 CFR § 300.2(i): ". . . . non-Federal funds *that comply with the limitations, prohibitions, and reporting requirements set out in subpart B of this part*, which are or will be disbursed by a State, district or local committee of a political party for Federal election activity *or non-Federal activity [subject to state law]* . . .").
Likewise, read in combination, proposed 11 CFR § 300.32(b)(2) and (c)(4) could be interpreted to permit Levin funds to be spent on activities permissible under state law that affect Federal elections but do not constitute Federal election activity (*e.g.,* voter registration not immediately proximate to Federal elections), *without allocation being required*. However, allocation should be required for any such disbursements (*see* subsequent discussion of proposed 11 CFR § 300.33).

Accordingly, we urge that the Commission make the following modifications to subsections (b) and (c):

- subsection (b)(1) should be revised to read, "Subject to the conditions set out in paragraph (c) of this section, *only* the following types of Federal election activity:"

- subsection (b)(3) should be revised to read, *"Subject to the conditions set out in paragraphs (c)(3) and (4) of this section*, any *other, non-Federal* use that is lawful under the laws of the State in which the committee is organized."

- subsection (c) should be re-titled: "*Conditions and restrictions on spending Levin funds*"

- subsection (c)(4) should be revised to read: "The expenditure or disbursement *on the activities described in subsection (b)(1)* must be allocated between Federal funds and Levin funds according to 11 CFR 300.33. *The expenditure or disbursement on any other activity required to be allocated by 11 CFR 300.33 must be so allocated*."

- Proposed 11 CFR § 300.32(d) should be slightly revised to read: "A state, district or local committee of a political party that makes disbursements for non-Federal activity may make those disbursements from its Federal, *Levin*, or non-Federal funds, subject to the laws of the State in which it is organized . . ."

The Commission correctly interprets BCRA to require that local party organizations that do not qualify as political committees comply with the requirement that Federal funds be used for "Federal election activity," except as provided under the Levin Amendment. BCRA's use of the term "committee" in 2 U.S.C. § 441i(b) does *not* limit the coverage of that subsection to "political committees." Excluding state and local party organizations that do not qualify as political committees would create a loophole permitting party spending of soft money on "Federal election activity" as under the current system.

Proposed 11 CFR § 300.33, Allocation

BCRA designates certain state, district or local party committee activities as "Federal election activity"– presumptively to be financed with hard money (except pursuant to the Levin Amendment). However, the definition of "Federal election activity" did not encompass every state, district or local party activity or payment that affects Federal elections. For example, state, district or local party committee payments for administrative costs, voter registration not immediately proximate to Federal elections, and certain salaries affect Federal campaigns, even though these are not designated "Federal election activity" by BCRA. Prior to BCRA's enactment, these particular activities were required to be financed with a mix of Federal and non-Federal funds pursuant to allocation formulae set by the Commission.

Previously allocated activities that do not constitute "Federal election activity" must continue to be allocated. We employed the designation of "Federal election activity" for

activities that -- because of their particularly direct and substantial impact on Federal elections -- warranted either exclusive hard money financing or financing pursuant to the strict Levin Amendment restrictions. In doing so, we did not suggest or imply that these were the *only* state, district or local party activities or payments that affected Federal elections, that other currently allocated activities do not in fact affect Federal elections, or that the latter activities should no longer be allocated.

Rather, BCRA was a response to perceived inadequacies in the prior campaign finance system which too readily permitted the expenditure of soft money on activities that influence Federal elections. Accordingly, we built our reforms on top of the prior system's soft money restraints. It would be flatly contrary to the entire intent and purpose of BCRA if its steps forward were somehow considered to occasion steps backwards in areas not directly addressed by the new law.

(a) Proposed 11 CFR § 300.33(a)(1) correctly states that the salaries of employees who spend more than 25 percent of their time in any given month on "Federal election activity" must be paid only with Federal funds. However, this subparagraph also states that state, district and local party committees "may" allocate the salaries of employees who spend 25 percent or less of their time on Federal election activity between the committee's Federal and non-Federal accounts. We strongly believe that allocation with respect to employees who spend 25 percent or less of their time on Federal election activity should be *required*, except in the case of employees who spend no time in a given month on activities in connection with a Federal election.

Indeed, proposed 11 CFR § 300.33(b)(ii) appears to anticipate this result, stating that salaries of employees who spend 25 percent of less of their compensated time in a given month on activities in connection with a Federal election "shall" be allocated (the Commission's commentary likewise indicates that such salaries would be required to be allocated). Of course, as an alternative to allocation in these circumstances, the Commission could clarify such party committees could finance employee salaries exclusively with Federal funds.

Moreover, a state, district or local party committee should be able to allocate salaries of employees between either its Federal and non-Federal accounts or, if the committee prefers, its Federal and Levin accounts. Proposed 11 CFR § 300.33(a) and (b) should be revised to reflect these clarifying changes.

Proposed 11 CFR § 300.33(a)(2) states that state, district or local party committees "may" allocate administrative costs between their Federal and non-Federal accounts (except to the extent directly attributable to a clearly identified Federal candidate). This concept is reinforced in proposed 11 CFR § 300.33(b)(2), which provides an allocation formula for such party committees "that *choose* to allocate administrative expenses." (emphasis added). For the reasons stated above, *we strongly oppose scaling back prior law to make allocation of administrative expenses merely an option for state, district and local party committees*. Accordingly, the Commission should amend proposed 11 CFR § 300.33(a)(2) to read: "*Except to the extent paid only with Federal funds*, State, district, and local party committees *must* allocate administrative costs . . . ." As suggested for salary costs, a state, district or local party committee

should be able to allocate administrative costs between either its Federal and non-Federal accounts or, if the committee prefers, its Federal and Levin accounts.

Proposed 11 CFR § 300.33(a)(3) must be revised to accurately reflect BCRA. We suggest the following modifications:

> "*Costs of voter registration within a certain time period, voter identification, get-out-the-vote, and generic campaign activity.* State, district, and local party committees that have established a Federal account and a separate Levin account pursuant to 11 CFR 300.30(b) must, *except to the extent paid only with Federal funds*, allocate disbursements or expenditures between these two accounts for:
>
> (i) Voter registration activity during the period that begins on the date that is 120 days before the date of a regularly scheduled Federal election and that ends of the date of the election, provided that the activity does not *refer to a clearly identified candidate for Federal office and such disbursements and expenditures are not for the costs of any broadcasting, cable or satellite communication (other than a communication which refers solely to a clearly identified candidate for state or local office)*
>
> *(ii)* Voter identification, get-out-the-vote activity, or generic campaign activities conducted in connection with an election in which a candidate for Federal office is on the ballot, *provided that the activity does not refer to a clearly identified candidate for Federal office and such disbursements and expenditures are not for the costs of any broadcasting, cable or satellite communication (other than a communication which refers solely to a clearly identified candidate for state or local office)*

Proposed 11 CFR § 300.33(b)(4) allows expenses for voter registration undertaken by a state, district or local party committee outside of the period beginning 120 days before a regularly scheduled Federal election and ending on the date of that election to be paid with 100 percent non-Federal funds. For the reasons stated above, we strongly disagree with this proposed regulation. Allocation between the Federal and non-Federal or Federal and Levin accounts of a state, district or local party committee must be *required* for spending on voter registration activity outside the time frame of 120 or less days before a Federal election, except for spending on that activity (so long as a Federal candidate is not mentioned) prior to odd-year elections in those states where regularly scheduled state elections are held in odd years. To the extent this constitutes spending on "exempt activity," it would be allocated between Federal and non-Federal accounts (or Federal and Levin accounts) but not count as an "expenditure" for purposes of political committee status.

Proposed 11 CFR § 300.33(b)(5) states that expenses for voter identification, get-out-the-vote activity, and generic campaign activity "when no Federal candidate is on the ballot" may be paid with 100 percent soft money. This is inconsistent with BCRA. BCRA defines get-out-the-vote

activity, generic campaign activity, and voter identification to be "Federal election activity" – and thus *not* eligible for 100 percent non-Federal financing – when "*conducted in connection with an election in which a candidate for Federal office appears on the ballot* . . ." 2 U.S.C. § 431(20)(a)(ii) (emphasis added). This is a very different concept from suggesting that such activities may be financed exclusively with soft money if undertaken merely "when no Federal candidate is on the ballot." The language of this subsection must be revised to conform with that of BCRA.

Expenses for get-out-the-vote activity, voter identification, and generic campaign activity conducted in odd-numbered years *solely* in states which hold regularly scheduled state elections in such years may be paid with 100 percent non-Federal funds (so long as a candidate for Federal office is not mentioned and the activity is not in any other respect a "Federal election activity"). This describes get-out-the-vote activity, voter identification, and generic campaign activity that does not constitute "Federal election activity." In all other instances, get-out-the-vote activity, voter identification, and generic campaign activity conducted at any point during a two-year Federal election cycle must either be financed exclusively with hard money or, if permissible, allocated between a state, district or local party committee's Federal and Levin accounts.

Proposed 11 CFR § 300.33(c) deems certain state, local or district party committee costs not allocable – and thus to be financed exclusively with Federal funds. This regulation in its current form does not accurately reflect the requirements of BCRA. Subsection (c)(2) indicates that all activities (except certain fundraising costs) that are wholly or partly in connection with Federal elections and do not refer to a clearly identified Federal candidate must be financed exclusively with hard money. In fact, as acknowledged elsewhere in the proposed regulations, the Levin amendment expressly contemplates that spending on certain activities at least partly in connection with Federal elections that do not mention Federal candidates (and are subject to other restrictions) would be allocated between state, district or local party committees' Federal and Levin accounts.

Likewise, this proposed language would require voter registration activities that neither refer to a Federal candidate nor are proximate to Federal elections, as well as administrative costs, to be financed exclusively with hard money. These activities, however, may currently be financed with an allocation of Federal and non-Federal funds and, as discussed above, should continue to be subject to an allocation requirement. Similarly, the requirement in subsection (c)(1) that any state party activity that refers to a clearly identified candidate for Federal office be financed exclusively with hard money is overbroad. For example, voter registration activity outside of the 120-day window may be allocated even if it mentions a clearly identified Federal candidate, so long as such activity does not fall under the "public communictions" prong of "Federal election activity."

Accordingly, we recommend that the Commission delete proposed 11 CFR § 300.33(c)(2) and revise subsection (c)(1) to read as follows:

"(1) *Federal election* activities that refer to clearly identified Federal candidates. Disbursements by State, district or local party committees for *Federal election activity* that refers to a clearly identified candidate for Federal office must not be allocated between or among Federal, non-Federal and Levin accounts. Only Federal funds must be used."

We support proposed 11 CFR § 300.33(c)(3). As discussed with respect to proposed 11 CFR § 300.32(a)(3), this would mean that a state party fundraising activity must be financed exclusively with Federal funds if amounts raised by virtue of that activity are ultimately disbursed in whole *or in part* for Federal election activity (*e.g.,* the state party could not allocate the costs of a fundraising activity which raises funds that are ultimately disbursed for both Federal election activity and other activities).

The allocation ratios provided in 11 CFR § 300.33(b) permit too great a percentage of soft money to be spent on activities that affect Federal elections, in contravention of FECA. Although the Commission acknowledges in its commentary that one goal of the allocation regulations is "to assure that activities deemed allocable are not paid for with a disproportionate share of non-Federal or Levin funds," the proposed ratios in fact underestimate the impact on Federal elections of the activities for which allocation is required.

If the Commission is committed to simplifying the allocation process, we urge that it adopt either of the two following allocation ratios. These ratios would achieve the objective of simplification without permitting allocable activities to be financed with an inappropriately large share of non-Federal or Levin funds.

Allocation Option I

In non-Presidential two-year Federal election cycles, state, local or district party committees must allocate at least 33 percent of expenses for Levin activities and voter registration activities that are not "Federal election activity" and at least 25 percent of administrative expenses to their Federal accounts. In Presidential two-year Federal election cycles, state, local or district party committees must allocate at least 40 percent of expenses for Levin activities and voter registration activities that are not "Federal election activity"and at least 25 percent of administrative expenses to their Federal accounts; or

Allocation Option II

Use the Commission's proposed allocation ratios for administrative expenses but apply each such ratio throughout the respective two-year Federal election cycle (*i.e.*, for a Presidential and Senate two-year election cycle in a state, 36 percent Federal allocation; for a Presidential but non-Senate two-year election cycle in a state, 28 percent Federal allocation; for a Senate but non-Presidential two-year election cycle in a state, 21 percent Federal allocation; and for a non-Presidential and non-Senate two-year election cycle in a state, 15 percent Federal allocation); and

For Levin activities and voter registration activities that are not "Federal election activity," use the highest Federal ratios from ballot composition-based allocation in each of the six state groupings examined by the Commission, applying each such ratio throughout the respective two-year Federal election cycle (*i.e.*, for a Presidential and Senate two-year election cycle in a state, 43 percent allocation; for a Presidential but non-Senate two-year election cycle in a state, 33 percent allocation; for a Senate but non-Presidential two-year election cycle in a state, 25 percent Federal allocation; and for a non-Presidential and non-Senate two-year election cycle in a state, 16.67 percent Federal allocation).

We emphasize that these allocation ratios must apply over the entire two-year Federal election cycle. As written, the Commission's proposed allocation ratios (*see* proposed 11 CFR § 300.33(b)(2) and (3)) might be read to apply to individual years based on the particular ballot composition *for those years*. Thus, the Commission's proposed 15 percent Federal allocation requirement for "any year in which neither a Presidential nor a Senate candidate appears on the ballot" could be read to require merely 15 percent Federal allocation *every other year,* because every odd-numbered year is a year "in which neither a Presidential nor a Senate candidate appears on the ballot."

In other words, the Commission's proposal could be read to require merely 15 percent Federal allocation for years immediately preceding Presidential and Senate election years, Senate election years, and Presidential election years in a state. That result would plainly be contrary to the intent of the statute, since it would reflect a substantial weakening of the relevant Federal allocation requirements applicable prior to BCRA's enactment. We accordingly urge the Commission to adopt one of our two allocation options.

As discussed with respect to proposed 11 CFR § 300.30(a)(6), we support continuation of the well-established requirement that state, local and district party committees make allocable expenditures and disbursements in entirety from their Federal accounts, with any non-Federal share of such costs transferred to the Federal account from a Levin account or a non-Federal account within the current set time frames. However, we also believe that the Commission should continue to permit, as an alternative, such party committees to establish separate allocation accounts for purposes of making allocated expenditures and disbursements. In that scenario, there could be two separate allocation accounts – one for use in financing Levin

activities, and another for use in financing administrative costs and other non-Levin allocated costs.

Proposed 11 CFR § 300.33(d)(1), however, should be revised to conform with the allocation requirements spelled out in the previous subsections of 11 CFR § 300.33 and to reflect that allocation must continue to be required for voter registration not proximate to Federal elections, administrative costs, and salaries for certain employees. We accordingly suggest the following revisions:

> "(1) *Payments from Federal accounts.* State, district and local party committees must pay the entire amount of an allocable expense from their Federal accounts and must transfer funds from their non-Federal account or Levin account to the Federal account for administrative *costs, voter registration activities required to be allocated under subsection (b)(4), and salaries described in subsection (b)(1)(ii), or* from their Levin account *to the Federal account* for expenses related to activities identified in paragraph (a)*(3)* of this section."

Proposed 11 CFR § 300.34, Transfers

Proposed 11 CFR § 300.34 must be clarified to reflect that 2 U.S.C. § 441i(b)(2)(B)(iv) was not intended to prevent state, district, and local parties from using Federal funds raised on behalf of such parties by Federal and state officeholders, candidates and parties for the Federal component of allocated Levin expenditures, so long as the Federal funds were contributed directly to the state, local, and district parties by the initial contributor and were not transferred from any other state, local, or national party entity.

Furthermore, the Commission should include in its regulations a requirement that state, district, and local party committees making Levin expenditures employ standard industry accounting methods to ensure that no transferred Federal funds are used as the Federal component of allocated spending on Levin activities. Without such accounting measures, there will be no way to ensure that state, district, or local committees are not evading the Act's restrictions on the use of transferred Federal funds for these purposes.

Proposed 11 CFR § 300.35, Office buildings

We support proposed 11 CFR §300.35. In response to the Commission's request for comment, the use of the term "building" rather than "facility" in BCRA was intended to explicitly restrict the expenditure of state, local, and district party building funds to only the purchase or construction of a state party office building, pursuant to state law. Thus, under BCRA, state, district, and local party committees would not be permitted to pay for items such as office equipment, furniture, or machinery exclusively out of their non-Federal building funds or otherwise with 100 percent non-Federal funds.

Furthermore, in response to the Commission's requests for comments on the revenues acquired by leasing space within a state, district, or local party committee, BCRA would permit a state, district or local party committee to generate income by leasing parts of its building facility at fair market rates, so long as such revenues were then deposited and used as non-Federal funds. Specifically, the purchase of a building in whole or in part with non-Federal funds would require that the rental income generated be deposited in the committee's non-Federal account and used for only non-Federal purposes. In addition, rental income generated from a building purchased solely with Federal funds could be deposited in the committee's Federal account, only if all of the revenues collected comply with the restrictions, prohibitions, and reporting requirements of the Act.

Notwithstanding the preemption provisions in 2 U.S.C. § 453(b)(1), the Commission must not allow state, local, and district party committees to use funds from foreign nationals to pay for the construction or purchase of state, local, or district office buildings. State, local, and district party committees are currently prohibited from doing so under 2 U.S.C. § 441(e), and nothing in BCRA changes the application of this provision to the purchase or construction of state, local, or district party committee buildings.

In further response to the Commission's request for comments, it was our intent that administrative expenses related to office buildings be allocable between Federal and non-Federal accounts or Federal and Levin accounts.

Proposed 11 CFR § 300.36, Federal election activity reporting and recordkeeping

As it is currently written, 11 CFR § 300.36(b)(2)(ii) could be read to omit the application of the itemization requirements that are listed in 2 U.S.C. 434(e)(3) to the receipts and disbursements of Levin funds in excess of $200 for any calendar year and are required by BCRA to apply. However, we note that the Commission correctly recognizes our intent to apply these disclosure provisions to Levin funds in the commentary associated with 11 CFR § 300.36. Thus, the Commission must modify the text of the regulation to clarify that the disclosure and itemization requirements of the Act apply to the receipt and expenditure of Levin funds.

Proposed 11 CFR § 300.37, Solicitation and donation restrictions to certain tax-exempt organizations

Proposed 11 CFR § 300.37 correctly prohibits state, district and local committees of a political party from making or soliciting donations to 501(c) tax-exempt organizations that make expenditures or disbursements in connection with an election for Federal office, including expenditures or disbursements for Federal election activity, as well as to certain 527 tax-exempt organizations.

In response to the Commission's request for comment, we believe that it would be in keeping with the intent of BCRA to carve out from the definition of "political committee" a distinction that would permit, state, district, and local party committees to make a non-Federal donation to a

section 527 organization registered as a State PAC, so long as such a State PAC does not make any expenditures or disbursements in connection with an election for Federal office, including expenditures or disbursements for Federal election activity.

Proposed 11 CFR § 300.50, Prohibited fundraising by national party committees

Please see our discussion of proposed 11 CFR § 300.11, which is identical to this provision.

Proposed 11 CFR § 300.51, Prohibited fundraising by State, district, and local party committees

Please see our discussion of proposed 11 CFR § 300.37, which is identical to this provision.

Proposed 11 CFR § 300.52, Fundraising by Federal candidates and officeholders

We believe several modifications to proposed 11 CFR § 300.52 are necessary. Proposed 11 CFR § 300.52 outlines permissible solicitations for Federal candidates and officeholders as prescribed by 2 U.S.C. § 441i(e)(4).

First, the Commission must modify 11 CFR § 300.52(a)(1) to clarify that the Federal candidate and officeholder solicitation restrictions in the Act with regard to 501(c) tax-exempt organizations apply only to Federal candidates and officeholders making solicitations for 501(c) tax-exempt organizations engaged in either Federal election activity or activities in connection with elections. Thus, 11 CFR § 300.52(a)(1) should read: "The solicitation is not specifically to obtain funds for the organization to engage in Federal election activity or in activities in connection with elections." Once this change is made, 11 CFR § 300.52(a)(3) should be deleted. Except as provided in subsection (b), a Federal candidate or officeholder may not solicit funds for a 501(c) organization specifically for *any* Federal election activity or activities in connection with elections.

Accordingly, the Commission must interpret BCRA to permit a Federal officeholder or candidate to make a specific solicitation for funds, without source or amount limitations, for a 501(c) tax-exempt organization that does not engage in Federal election activities or activities in connection with elections. Thus, nothing in BCRA would prevent a Federal officeholder or candidate from making a specific solicitation for funds for a blood drive for the Red Cross, as the Red Cross engages in no Federal election activity or activities in connection with elections.

Similarly, a Federal officeholder or candidate may make a specific solicitation for funds, without source or amount limitations, for a 501(c) tax-exempt organization that engages in Federal election activities or activities in connection with elections, provided that: (a) it is not an organization whose principal purpose is to engage in voter registration or get-out-the-vote activity or any other type of Federal election activity; and (b) the specific solicitation made by the Federal candidate is not for a Federal election activity or activity in connection with an election. Thus, a Member of Congress could make a specific solicitation for funds, without

source or amount limitations, for the NAACP College Fund or to support the NRA's firearms training programs, even though these organizations also engage in certain Federal election activities.

Second, the Commission must clarify that 11 CFR § 300.52(b)(1) and (2) apply only to solicitations for 501(c) tax-exempt organizations and not for 527 organizations or any other organizations. As explained by Senator McCain, 2 U.S.C. § 441i(e)(4) is intended to deal exclusively with solicitations for 501(c) tax-exempt organizations. *See* Cong. Rec. S2140 (Mar. 20, 2002). Thus, the entire subsection, including the provision allowing Federal candidates and officeholders to make specific solicitations of $20,000 per year only from individuals for voter registration activity 120 days before a Federal election and get-out-the vote activity, as well as solicitations for an organization whose principal purpose is to engage in these activities, authorizes solicitations only for 501(c) tax-exempt organizations.

In response to the Commission's request for comments, it was our intent that 2 U.S.C. § 441i(e)(4) should also apply to an agent acting on behalf of a Federal candidate or officeholder. However, this exemption would not permit an entity acting as an officeholder or candidate's agent, an entity directly or indirectly established, financed, maintained, or controlled by an officeholder or candidate, or an officeholder or candidate acting on behalf of an entity to make general or specific solicitations for funds for a 501(c) tax-exempt organization. 2 U.S.C. § 441i(e)(4)(A) and (B) refer to "an individual" and thus do not permit the entities or individuals described in the preceding sentence to make the solicitations authorized by those paragraphs.

Furthermore, in response to the Commission's request for comments, we believe that the Commission should recommend to Federal candidates and officeholders that they obtain certification from the 501(c) tax-exempt organization for which they are soliciting without source or amount constraint that it is not an organization whose principal purpose is to conduct voter registration or get-out-the-vote activity or other Federal election activity.

Finally, in response to the Commission's request for comments, we believe that a Federal officeholder or candidate who is soliciting a donation from an individual who serves as a CEO of a major corporation or in an executive position in a labor union should be required to inform the individual that personal funds are being solicited and not funds from the individual's corporate or union treasury account.

Proposed 11 CFR § 300.60, Scope

We support proposed 11 CFR § 300.60.

Proposed 11 CFR § 300.61, Federal elections

The Commission should revise proposed 11 CFR § 300.61 to include "disburse" in the list of specified actions, so as to clarify that a person described in proposed 11 CFR § 300.60 must use *Federal* funds when disbursing funds in connection with an election for Federal office, including

for any Federal election activity. Thus, the first sentence of this section should read "No person described in 11 CFR § 300.60 shall solicit, receive, direct, transfer or *disburse* funds in connection with an election for Federal office, including funds for any Federal election activity . . ." This modification will make proposed 11 CFR § 300.61 parallel with proposed 11 CFR § 300.62, as was our intent.

Proposed 11 CFR § 300.62, Non-Federal elections

The Commission should delete "Federal" from this section, so it would read: "No person described in 11 CFR 300.60 shall solicit, receive, direct, transfer, or spend or disburse funds in connection with any non-Federal election, unless the amounts consist of funds that are subject to the limitations and prohibitions of the Act." This section should apply to *all* funds that are subject to the limitations and prohibitions of the Act.

Proposed 11 CFR § 300.63, Exceptions for State party candidates

We have no recommended modifications to proposed 11 CFR § 300.63.

Proposed 11 CFR § 300.64, Exemption for attending or speaking at fundraising events

In response to the Commission's request for comments on 11 CFR § 300.64, BCRA clearly prohibits Federal candidates and officeholders from soliciting funds for Federal election activities and activities in connection with a Federal election that are not subject to the limitations, prohibitions, and reporting requirements of the Act. Thus, nothing in 11 CFR § 300.64 should be construed to permit a Federal candidate or officeholder to make solicitations at a fundraiser for non-Federal or Levin funds, even if the candidate or officeholder is attending, speaking, or is a featured or honored guest at the event. Clearly stated, the exemption that allows a Federal candidate to attend, speak at, or be a featured guest at such a fundraising event is not an exemption from the general solicitation ban in the law.

In response to the Commission's request for comments, however, this exemption would permit the state, local, or district party to publicize in advance that a Federal candidate or officeholder would be attending and speaking at a fundraising event, or to include the Federal candidate or officeholder on the invitation for the event, or to honor the Federal candidate or officeholder at the event, but only to the extent that these actions convey the Federal officeholder's or candidate's capacity as a guest, attendee, or honoree of the event, and not in any way that could imply that the Federal candidate or officeholder is soliciting contributions or attendance for the fundraiser. For example, a Federal officeholder or candidate could not be included in the host committee, as that would clearly imply solicitation.

Proposed 11 CFR § 300.65, Exceptions for certain tax-exempt organizations

Please see our discussion of proposed 11 CFR § 300.52, which is identical to this provision.

Proposed 11 CFR § 300.70, Scope

We support proposed 11 CFR § 300.70.

Proposed 11 CFR § 300.71, Federal funds required for certain public communications

11 CFR § 300.71 prohibits state and local candidates and officeholders from funding public communications that refer to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified), and that promotes or supports any candidate for that Federal office, or attacks or opposes any candidate for that Federal office (regardless of whether the communication expressly advocates a vote for or against a candidate) unless the amounts consist of Federal funds that are subject to the limitations, prohibitions, and reporting requirements of this Act.

While we agree with the language of this section, we note again that 11 CFR § 300.2(l)(1) must be revised significantly. That provision incorrectly construes when communications "promote, support, attack or oppose" a Federal candidate, seriously undermining a key purpose of BCRA – to prevent state and local parties and candidates from using soft money for advertisements that influence Federal elections.

Proposed 11 CFR § 300.72, Federal Funds not required for certain communications

The Commission must modify proposed 11 CFR § 300.72(a) to reflect the purpose of 2 U.S.C. § 441i(f)(2). 2 U.S.C. § 441i(f)(2) was intended cover situations in which a candidate for state or local office is also a Federal officeholder or a candidate for Federal office or is running for state or local office against an individual that also qualifies as a Federal officeholder or candidate. In these instances, BCRA specifically allows that candidate for state or local office to spend non-Federal funds on a public communication in connection with an election for that state or local office that "refers only to such individual or to another candidate for the State or local office held or sought by such individual, or both." Thus, BCRA would allow a state candidate, regardless of whether or not that candidate is also a Federal candidate or officeholder, to use non-Federal funds to attack or oppose any other candidate *for that state office* (including one who is also a Federal candidate or officeholder) or to support his or her own candidacy *for that state office*, subject to state law. Proposed 11 CFR § 300.72(a) must be modified accordingly.

Proposed 11 CFR § 300.72 also provides an exception for communications that come within the scope of 11 CFR § 300.2(l)(2)(ii) – which contains a series of *per se* exclusions from the definition of communications that "support," "promote," "attack," or "oppose" Federal candidates. As noted in our discussion of proposed 11 CFR § 300.2, those *per se* exclusions are inconsistent with BCRA. Accordingly, we believe that 11 CFR § 300.72(b) should be deleted.

11 CFR § 9034, Entitlements

We support proposed 11 CFR § 9034.

11 CFR § 9034.8, Joint fundraising

We support proposed 11 CFR § 9034.8.